UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 73

Docket No. DE-315I-11-0023-I-1

Angela K. Burton,

Appellant,

v.

Department of the Air Force,

Agency.

June 8, 2012

Angela K. Burton, Clearfield, Utah, pro se.

Kevin C. Probasco, Esquire, Hill Air Force Base, Utah, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her supervisory probationary appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review and AFFIRM the initial decision as modified by this Opinion and Order.

BACKGROUND

¶2 On January 3, 2010, the agency promoted the appellant from the WL-10 position of Aircraft Engine Mechanic Leader to the WS-10 position of Aircraft Engine Mechanic Supervisor. Initial Appeal File (IAF), Tab 6, Subtab 4b at 10. On October 10, 2010, during her 1-year supervisory probationary period, the

agency returned the appellant to her former non-supervisory position for failure to complete her probation as a result of alleged deficient performance and misconduct. IAF, Tab 6, Subtabs 4a, 4b at 1. Specifically, the agency found that: (1) the appellant did not show up to conduct a meeting for her subordinates as scheduled on May 25, 2010, and the Section Chief needed to cover the meeting for her; (2) the appellant was absent without leave for a period of 10 hours on May 26, 2010, because she did not report to work and failed to call to request leave; (3) the appellant was negligent in her duties to inspect her equipment as of August 5, 2010, despite having been notified of the requirements in January 2010; and (4) the appellant was observed numerous times sleeping during various meetings. IAF, Tab 6, Subtab 4b at 1.

¶3 On October 13, 2010, the appellant filed an appeal with the Board, alleging that the agency demoted her, the reasons for the alleged demotion lacked merit, the alleged demotion was based on gender and race discrimination, as well as discrimination due to her marital status, and the agency committed prohibited personnel practices in violation of 5 U.S.C. §§ 2302(b)(4), (6), (7), and (12) when it allegedly demoted her. IAF, Tab 1. In support of her claim of marital status discrimination, the appellant alleged that her second-line supervisor, Brandon Rogers, informed her that one of the reasons she was being returned to her non-supervisory position was because she was a single mother. *Id.* at 5. The administrative judge noted that the Board might lack jurisdiction over the appeal, advised the appellant how she could make a non-frivolous allegation of jurisdiction over her claim, and directed the appellant to file evidence and argument showing the Board's jurisdiction. IAF, Tab 2 at 2. After convening a status conference, the administrative judge found that the appellant had made a non-frivolous allegation of marital status discrimination entitling her to a jurisdictional hearing. IAF, Tabs 7, 8. At the hearing, the appellant testified that Mr. Rogers had commented on her status as a single mother when he informed her of her return to a non-supervisory position. Hearing Compact Disc (Hearing

CD). Mr. Rogers testified that he did not mention the appellant's marital status or consider it in deciding to terminate the appellant's promotion, and the appellant's first-line supervisor, Donald Knies, gave corroborating testimony. *Id.*

¶4 In her initial decision, citing *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5 (2008), the administrative judge found that, because the agency had already articulated a non-discriminatory reason for its action, i.e., the charged performance deficiencies and misconduct, it was unnecessary to determine whether the appellant had made a prima facie case, and was instead appropriate to proceed directly to the ultimate question of whether the appellant had met her overall burden of proving marital status discrimination. IAF, Tab 15 (Initial Decision) at 6. Having determined that Mr. Rogers's testimony was more credible than the appellant's, and also that there was ample evidence of the appellant's performance deficiencies, the administrative judge concluded that the appellant had not met her overall burden, and therefore had not succeeded in establishing jurisdiction under 5 C.F.R. § 315.908. *Id.* at 7. The administrative judge further found that, absent jurisdiction, the Board lacked the authority to review the appellant's additional claims of gender and race discrimination and prohibited personnel practices. *Id.* at 7-8. Accordingly, the administrative judge dismissed the appeal.

¶5 The appellant has filed a petition for review. Petition for Review File (PFR File), Tab 1. In the petition, the appellant sought an extension of time to obtain legal counsel and supplement her arguments on review. *Id.* at 4. The Office of the Clerk of the Board (the Clerk) granted an extension of time of 30 days, and the appellant filed a second request for an extension of time 2 days after the Board's deadline. PFR File, Tabs 2, 3. The Clerk subsequently denied the appellant's untimely request for an extension of time to file a supplement in support of her petition for review. PFR File, Tab 4. The agency has filed a response in opposition to the appellant's petition for review. PFR File, Tab 5.

ANALYSIS

Jurisdictional Analysis

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant bears the burden of demonstrating by preponderant evidence that the Board has jurisdiction over her appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i).

¶7 Under 5 U.S.C. § 3321, an individual serving in an initial appointment as a supervisor or manager in the competitive service is required to serve a probationary period. *See De Cleene v. Department of Education*, 71 M.S.P.R. 651, 654-56 (1996) (describing the legislative history of this statute and noting OPM's implementing regulations at 5 C.F.R. §§ 315.901-.909). An individual in the competitive service who has been promoted to a supervisory position and who does not satisfactorily complete the probationary period, like the appellant, "shall be returned to a position of no lower grade and pay than the position from which the individual was . . . promoted." 5 U.S.C. § 3321(b); *see* 5 C.F.R. § 315.907(a). Here, the appellant was returned to the WL-10 position of Aircraft Engine Mechanic Leader from which she was promoted. Compare IAF, Tab 6, Subtab 4b at 10 (the appellant's promotion Standard Form (SF)-50), with IAF, Tab 6, Subtab 4a (the appellant's SF-50 returning her to her prior position). Under these circumstances, an employee "has no appeal right," unless she nonfrivolously alleges that the action "was based on partisan political affiliation or marital status." 5 C.F.R. § 315.908; *see De Cleene*, 71 M.S.P.R. at 656.

¶8 The Board has long held, as explained by our reviewing court in *Stokes v. Federal Aviation Administration*, 761 F.2d 682 (Fed. Cir. 1985), that a probationary employee faces a two-step process in establishing Board jurisdiction

based on a claim of marital status discrimination.[1] The appellant must first make an allegation of marital status discrimination supported by factual assertions indicating that the allegation is not a pro forma pleading. *Id*. at 686. If the appellant makes such a facially non-frivolous allegation, she has a right to a hearing at which she must support her allegation with a showing of facts which would, if not controverted, require a finding that the agency action was motivated by marital status discrimination. *Id*. If, and only if, the appellant makes the required showing in support of her allegation, and the agency is unable to successfully controvert that factual showing, dismissal for lack of jurisdiction is inappropriate, and the Board should proceed to determine the merits of the case, i.e., whether the agency has articulated and supported a nondiscriminatory reason for its action, and whether the probationary employee has shown that reason to be mere pretext. *Id*. at 686-87.

¶9 Here, in order to establish Board jurisdiction over her appeal, the appellant relied solely on her allegation that Mr. Rogers told her the agency was returning her to her former non-supervisory position in part because she was a single mother. IAF, Tab 1 at 5. The administrative judge determined that the allegation was nonfrivolous and held a jurisdictional hearing, consistent with the first step outlined in *Stokes*. IAF, Tab 8; *Stokes*, 761 F.2d at 686. At the hearing, the administrative judge made a credibility determination regarding that alleged statement, finding Mr. Rogers's denial of making that statement credible. Initial Decision at 5. Under *Stokes*, the agency successfully controverted the appellant's sole allegation of marital status discrimination at the jurisdictional hearing, thus

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[1] *Stokes* addresses 5 C.F.R. § 315.806(b), a separate regulatory provision from the one at issue in this case. However, 5 C.F.R. § 315.806(b) provides, in language similar to that found at 5 C.F.R. § 315.908(b), that an employee may appeal to the Board a probationary termination not required by statute "which he or she alleges was based on partisan political reasons or marital status." 5 C.F.R. § 315.806(b). We therefore find that the legal standards applicable to claims under 5 C.F.R. §§ 315.806(b) and 315.908(b) are the same.

precluding the appellant from meeting her burden on jurisdiction. *Stokes*, 761 F.2d at 686-87 (finding that the appellant "met his Waterloo when the agency succeeded in directly controverting [his] showing [in support of his jurisdictional allegation of marital status discrimination], and thus proving that Stokes had not met his burden of establishing his right to appeal and thus the Board's jurisdiction"). The administrative judge here, however, proceeded to weigh the evidence in support of the agency's stated reason for the action against the appellant's evidence of discrimination. Initial Decision at 3-7. Under *Stokes*, the administrative judge made a judgment on the merits of the appeal and not a jurisdictional determination. *Stokes*, 761 F.2d at 687. However, in light of the decision of our reviewing court in *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc), we find that the administrative judge correctly found that the Board lacked jurisdiction over the matter because the appellant failed to prove her claim of marital status discrimination.

¶10 The appellant in *Garcia* filed an appeal with the Board alleging that she involuntarily accepted a reduction in grade because the agency failed to accommodate her disability. *Garcia*, 437 F.3d at 1325-26. The administrative judge determined that she had not proven that her actions were involuntary, and dismissed her case for lack of jurisdiction without holding a hearing or reaching her discrimination claims. *Id.* at 1326. On appeal to the Federal Circuit, the appellant contended that she could establish jurisdiction merely by making a non-frivolous allegation that she accepted a position at a lower grade involuntarily. *Id.* at 1330. The Federal Circuit, however, held that, in determining jurisdiction over a constructive adverse action appeal, the Board should follow a two-step process:

> [O]nce a claimant makes non-frivolous claims of Board jurisdiction, namely claims that, if proven, establish the Board's jurisdiction, then the claimant has a right to a hearing. At the hearing, the claimant must prove jurisdiction by a preponderance of the evidence. If the Board determines that the claimant fails to prove jurisdiction by a

> preponderance of the evidence, then the Board does not have jurisdiction.

Id. at 1344. This process differs from the one described in *Stokes* in requiring the appellant at the hearing not merely to provide evidence of jurisdiction which the agency does not directly controvert, but to prove the basis for jurisdiction by a preponderance of the evidence.

¶11 We find that the two-step process defined in *Garcia* applies to an appeal brought under 5 C.F.R. § 315.908.[2] Accordingly, we find that *Stokes* has been abrogated by the Federal Circuit's subsequent *en banc* decision in *Garcia*. Having won the right to a hearing by alleging facts that would, if proven, establish jurisdiction, the appellant in this case was required to prove the basis for jurisdiction, i.e., marital status discrimination, by a preponderance of the evidence. Thus, because the administrative judge properly found that the appellant failed to meet that ultimate burden, Initial Decision at 3-7, the Board lacks jurisdiction over her appeal.

The Appellant's Arguments on Review

¶12 The appellant challenges the finding of the administrative judge that the testimony of Mr. Rogers was credible. Specifically, she asserts that Mr. Rogers and Mr. Knies lied while testifying at the hearing regarding the alleged comment about her status as a single mother. PFR File, Tab 1 at 3. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible,

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[2] The court did not indicate in *Garcia* whether the same process would apply outside the chapter 75 context. However, the court found in *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097 (2011), that the reasoning of *Garcia* – based as it was on the Board's regulation at 5 C.F.R. § 1201.56(a)(2) – applies equally as well in determining the Board's jurisdiction over an appeal brought under 5 C.F.R. § 353.304. Therefore, in light of *Bledsoe*, we find that the reasoning of *Garcia* applies to appeals brought under 5 C.F.R. § 315.908.

considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

¶13 Applying the *Hillen* factors, the administrative judge found Mr. Rogers's testimony to be credible. Initial Decision at 5. She found Mr. Rogers's demeanor to be forthright and concise, and sympathetic to the appellant. *Id.* The administrative judge noted that, although Mr. Rogers admitted that he had made a comment about the appellant's need to address matters in her personal life, he was very sympathetic to her situation and made it clear to the appellant that she could return to a supervisory position in the future. *Id.* She also found that Mr. Knies corroborated Mr. Rogers's testimony that no mention was made about the appellant's marital status during the meeting in which the agency returned her to her non-supervisory position, concluding that Mr. Rogers's denial was credible. *Id.* at 4-5. Given the administrative judge's thorough analysis, we find that the appellant has not set forth any basis to overturn the administrative judge's credibility determinations. *See Haebe*, 288 F.3d at 1301.

¶14 The appellant also alleges on review that the administrative judge incorrectly stated that the agency returned her to a non-supervisory position on October 10, 2010, rather than on September 16, 2010. PFR File, Tab 1 at 3. In its notice letter, the agency informed the appellant that her return to her former

non-supervisory position would be effective September 16, 2010. IAF, Tab 6, Subtab 4b at 2. However, the SF-50 form documenting the change stated that the effective date of the agency's action was October 10, 2010. IAF, Tab 6, Subtab 4a. Because both dates fall within the 1-year supervisory probationary period, the analysis of the appeal using either date remains the same and the appellant therefore has not provided any reason to disturb the initial decision of the administrative judge. 5 C.F.R. §§ 315.901, 315.905; IAF, Tab 6, Subtab 4b at 11.

¶15 The appellant further argues that, contrary to the administrative judge's finding, she did suffer a loss of grade and pay as a result of the return to her non-supervisory position. PFR File, Tab 1 at 3. It appears, however, based on the record, that the appellant is arguing that she suffered a loss of grade and pay when she was returned to her non-supervisory position from her supervisory position; not that the non-supervisory position to which the agency returned her was of a lower grade or pay than her former non-supervisory position immediately prior to the promotion. IAF, Tab 6, Subtabs 4a, 4b at 10. This argument does not establish jurisdiction over this appeal. 5 C.F.R. §§ 315.907(a), .908.

¶16 Finally, the appellant argues the merits of her demotion on review. PFR File, Tab 1 at 3. Because the Board lacks jurisdiction over the matter, the administrative judge correctly concluded that the Board does not have the authority to address the merits underlying the appellant's appeal. *See Maddox*, 759 F.2d at 10.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.